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13
14 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
15 **IN AND FOR THE COUNTY OF APACHE**

16
17 IN RE THE GENERAL ADJUDICATION
OF ALL RIGHTS TO USE WATER IN
18 THE LITTLE COLORADO RIVER
SYSTEM

Case No. CV6417-300

**NAVAJO NATION'S AMENDED
STATEMENT OF CLAIMANT –
PHASE III CLAIMS (IRRIGATION)**

(Assigned to Special Master
Susan W. Harris)

21
22 **CONTESTED CASE:** *In re Navajo Nation*, Case No. CV6417-300 (Phase III)

23 **DESCRIPTIVE SUMMARY:** The Navajo Nation's Amended Statement of
24 Claimant – Phase III Claims (Irrigation).

25 **NUMBER OF PAGES:** 9

26 **DATE OF FILING:** Original sent for filing to the Arizona Department of Water
27 Resources via hand-delivery on December 1, 2021.
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1 **I. INTRODUCTION**

2 The Navajo Nation (the “Nation”) files this, its Amended Statement of Claimant for
3 water uses for irrigation. By Order of December 28, 2016, the Special Master established
4 the schedule for the Nation and the United States as the Nation’s trustee to file amended
5 statements of claimant. The schedule has been amended twice by Order of December 21,
6 2018, and Order of May 29, 2020. Rather than file a single statement of claimant with all
7 uses included, accepting the joint recommendation of the Nation and the United States, the
8 Special Master ordered that three separate statements of claimant be filed for specific uses.

9 The Nation, on its own behalf and for its members,¹ submits the *Navajo Nation’s*
10 *Amended Statement of Claimant – Phase III Claims (Irrigation)* (“Amended Statement of
11 Claimant – Phase III”) for the historic, present, and future irrigation water uses on the Navajo
12 Reservation within the Little Colorado River (“LCR”) Basin. In so doing, the Nation does
13 not waive any objections it may have to the jurisdiction of this Court or to the propriety of
14 the Arizona adjudication proceedings. Nor does this submission constitute any waiver of the
15 sovereign powers of the Nation to make and be governed by its own laws and to regulate and
16 control the use and development of the resources, including water resources, within its
17 jurisdiction.

18 **II. LEGAL BASIS FOR WATER RIGHT CLAIMS WITHIN THE NAVAJO**
19 **RESERVATION**

20 Indian tribes are entitled to a right to use water based on two distinct principles of
21 federal law. First, an Indian tribe may retain certain rights when the tribe enters into a treaty

22 ¹ The Nation does not represent the interests of Navajo tribal members in Reservation
23 allotments, which are represented by the United States. However, the Nation holds a
24 beneficial interest in many of these allotments and represents its own interests in this
25 contested case, together with the United States as trustee. The Nation is informed that the
26 United States takes the position that its Phase III claims on behalf of the Nation include
27 claims for Reservation allotments. It is the Nation’s position that only those allotments that
28 were granted for the express purpose of irrigated agriculture under Section 1 of the General
Allotment Act, as reflected in the respective allotting documents, are properly asserted in this
Phase III subproceeding. *See* 24 Stat. 388 (Feb. 8, 1887), as amended by the Act of Feb. 28,
1891, 26 Stat. 794 and the Act of June 25, 1910, 36 Stat. 85 (when any part of an Indian
reservation “may be advantageously used for agricultural or grazing purposes” the President
is authorized “to allot to each Indian located thereon ... not to exceed eighty acres of
agricultural land or one hundred and sixty acres of grazing land. . .”).

1 with the United States. *Winans v. United States*, 198 U.S. 371, 381 (1905) (“[T]he treaty
2 was not a grant of rights to the Indians, but a grant of right from them, a reservation of those
3 not granted.”). Federal law, consistent with *Winans*, continues to recognize that an Indian
4 tribe occupying its aboriginal territory retains for itself all rights not expressly granted by the
5 tribe. See, e.g., *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert.*
6 *denied*, 352 U.S. 988 (1957) (recognizing Indians’ right to use water based on their right of
7 use and occupancy). “*Winans* rights essentially are recognized aboriginal rights.” 2 Waters
8 and Water Rights § 37.02(a)(2) (2020). “[T]he scope of a *Winans* right is dependent on
9 actual use over an extended period of time, although it is not a function of the extent of land
10 title. *Winans* rights preserve pre-existing uses, rather than establishing new uses.” *Id.* The
11 priority date for *Winans* rights dates from “time immemorial.” *Id.*

12 Second, the Supreme Court has long recognized that when the federal government
13 reserves land for a reservation it impliedly reserves unappropriated water to serve the
14 purposes for which the lands were reserved. *Winters v. United States*, 207 U.S. 564 (1908)
15 (establishing the federal reserved water rights doctrine as applicable to Indian tribes);
16 *Arizona v. California*, 373 U.S. 5467 (1963) (applying the federal reserved rights doctrine to
17 recognize water rights in five Arizona tribes located on and near the Colorado River).

18 The priority date for a tribal federal reserved right is dictated by the first federal action
19 demonstrating the federal government’s intent to set aside lands for an Indian tribe. *United*
20 *States v. Walker River Irr. Dist.*, 104 F.2d 334, 337 (9th Cir. 1939) (setting aside of lands in
21 1859 determined priority, rather than 1874 executive order). When a tribe has entered into
22 one or more treaties with the United States, the priority date for federal reserved rights is
23 established from the date of the treaty promising to establish a reservation and not the later
24 federal actions establishing the boundaries of the reservation. *Martinez v. Lewis*, 116 N.M.
25 194, 201, 861 P.2d 235, 242 (App. 1993) (rejecting as the basis of priority Executive Orders
26 establishing the Mescalero Apache Reservation and holding the priority of the Tribe’s
27 reserved water right date from the Treaty of 1852 in which the United States “promise[d] to
28 designate the Apaches’ territorial boundaries at its earliest convenience.”); see also *United*

1 *States v. Carpenter*, 111 U.S. 347 (1884) (1859 Treaty promising to survey lands for Indian
2 purposes was determinative of priority of rights, rather than later date when survey was
3 accomplished in 1872). The Nation is a party to two treaties with the United States. In the
4 Treaty Between the United States of America and the Navajo Tribe of Indians, 9 Stat. 974
5 (Sept. 9, 1849) ("1849 Peace Treaty"), in language virtually identical to that relied by the
6 Court in *Lewis*, the United States promised it would "at its earliest convenience designate,
7 settle and adjust [the Navajo Tribe's] territorial boundaries." *Id.* at art. IX. In the Treaty with
8 the Navaho, 1868, 15 Stat. 667 (Jun. 1, 1868) ("1868 Treaty"), the United States began to
9 fulfill the promise made in the 1849 Peace Treaty and established the initial boundaries of
10 the Navajo Reservation. Between 1878 and 1934, the United States added to the land base
11 of the Navajo Reservation through numerous executive orders and congressional acts. Other
12 land transactions by the United States and the Nation have further expanded the Navajo
13 Reservation.

14 Finally, federal law recognizes that an Indian tribe may have both *Winans* and *Winters*
15 right claims. *See, e.g., United States v. Adair*, 723 F.2d 1394, 1408, 1415-16 (9th Cir. 1984)
16 ("affirm[ing] the district court's decision that the Klamath Tribe is entitled to a reservation
17 of water, with a priority date of immemorial use, sufficient to support exercise of treaty
18 hunting and fishing rights" and a priority date of the treaty in 1864 for new irrigation uses).

19 The Navajo Nation claims the following priority dates for its water rights:

- 20 1. For Reservation lands within the June 1, 1868, Treaty boundary,
21 the Nation claims a priority date of time immemorial for past and
22 present water uses for irrigation initiated before the creation of
23 the reservation. These are aboriginal lands of the Navajo people,
24 to which the Nation continues to hold aboriginal title as
25 recognized by the Indian Claims Commission ("ICC"). For
future irrigation uses, the Nation claims a priority date based on
the 1849 Peace Treaty.
- 26 2. For Reservation lands within the original aboriginal territory of
27 the Navajo people as recognized by the ICC, but outside the 1868
28 Treaty boundary and determined to be extinguished by the
Treaty of 1868, the Nation claims a time immemorial priority for

1 irrigation uses that predate the 1849 Peace Treaty and continue
2 to the present, the Nation claims a priority date based on the
3 1849 Peace Treaty.

3. For all other Reservation lands, the Navajo Nation claims a time
4 immemorial priority for irrigation uses that predate the
5 1849 Peace Treaty and continue to the present. The ICC
6 acknowledged uses of Navajo people beyond the exclusive
7 aboriginal territory identified in its decision. For future
8 irrigation uses, the Nation claims a priority date based on the
9 1849 Peace Treaty.

10 **III. IMPORTANCE OF WATER TO NAVAJO PEOPLE AND NAVAJO** 11 **CULTURE**

12 The Navajo people have engaged in agriculture since time immemorial. They have a
13 long history of irrigating a variety of crops within the LCR Basin and continue to do so to
14 this day. As a practice bestowed upon the Navajo by the Holy People, agriculture remains a
15 vital and foundational aspect to the Navajo economy and culture.²

16 **IV. AMENDED WATER RIGHT CLAIMS FOR PHASE III WATER USE** 17 **(IRRIGATION) WITHIN THE NAVAJO NATION**

18 **A. Claim for Historic Irrigation**

19 The Nation adopts the quantity of historically irrigated acres (“HIA”) and the
20 accompanying annual water use claimed by the United States in its Amended Statement of
21 Claimant on behalf of the Navajo Nation (Phase III) filed on December 1, 2021.³

22 **B. Claim for Practicably Irrigable Acreage**

23 The Practicably Irrigable Acreage (“PIA”) standard is one method used to determine
24 the amount of water reserved for an Indian reservation. *See In re the Gen’l Adjudication of*
25 *all Rights To Use Water in the Gila River System and Source*, 201 Ariz. 307, ¶ 37. PIA is

26 ² See *Navajo Nation’s Amended Statement of Claimant – Phase II Claims* filed October 7,
27 2020, for a more detailed discussion of the cultural importance of water to the Navajo people.

28 ³ It is the intention of the U.S. to amend its HIA claim to include an additional 46 acres and
the accompanying water use identified by the Nation’s HIA expert. The Nation intends to
include the additional 46 acres in a subsequent amendment to this Amended Statement of
Claimant – Phase III (Irrigation).

typically used to identify lands that have not been irrigated in the past but are suitable for future irrigation. However, included within the Nation's claim for PIA are lands currently irrigated that, because of the approach adopted by the United States, are not part of the Nation's HIA claim. The Arizona Supreme Court defined practicably irrigable acres as "those acres susceptible to sustained irrigation at reasonable cost." *Id.* at ¶ 30. To determine PIA, the Nation's expert considered lands suitable for crop growth applying common irrigation practices and water supplies adequate to meet projected crop water demand. Described below are the data sources relied upon and the methodology employed to develop the Nation's PIA claim, including identification of suitable soils and available water supply, and the cropping assumptions relied upon in the analysis. The Nation reserves the right to modify its methodology, sources relied on and resulting analysis.

1. Source Data

Information was collected from various public sources relating to hydrology, land use, and soils data. Table 1 below summarizes the data and source of collection. Where possible, datasets published from authoritative and public sources were used.

Table 1. Data Sources	
Data Layer	Source/Agency
Hydrology, Land Cover, Civic	USDA/NRCS
Wetlands	FWS/NWI
Streams Ephemeral and Perennial	AZGeo Data Hub
Geology	Southwest Regional Gap Analysis Project
Soils	Soil Survey Geographic Database (SSURGO), NRCS, hosted by ESRI
Historically Irrigated Areas	National Resources Consulting Engineers, Inc.

2. Selection of Irrigable Acreage

The methodology to quantify the PIA relies on an assessment of the following three key components:

- Lands suitable for irrigation, otherwise known as arable land;
- Crop water requirement for crops grown on the identified arable lands; and
- Presence of water supplies available to meet the crop demands.

1 For lands to be practicably irrigable, they must be adequately suited for irrigation.
2 Suitable lands for future irrigation practices were selected by discarding lands with
3 incompatible uses, unsuitable geography, or existing crop cover, and analyzing the remaining
4 lands for suitable soils. Following this identification of arable land, the Nation's expert
5 researched climatic factors and regional agricultural practices to select a representative crop
6 that could be grown in the region. Irrigation will be successful if an adequate and sustainable
7 water supply is available to meet the water demands of the chosen crop types planted in
8 arable soils.

9 a) Lands Suitable for Irrigation

10 GIS methods and tools were used to estimate the lands most suitable for irrigation.
11 Parcels identified as historically irrigated acres or HIA were eliminated from the analysis.

12 Soils. Lands suitable for irrigation from the SSURGO database for the LCR Basin
13 were identified using GIS and were characterized by loamy, well-drained soils, naturally
14 leveled lands with less than four percent slope, and greater than 1.5 inches per foot water-
15 holding capacity. Soils classified as "poorly drained" or "excessively drained" were excluded
16 from consideration. The remaining soil areas generally aligned with LCR tributaries and
17 wash basins and the LCR alluvium. Soil selection criteria was further refined to include only
18 areas with slopes of less than 2.5 percent and an available water capacity of greater than
19 1.6 inches per foot.

20 Land Cover. The USDA geospatial gateway repository was used to identify land
21 cover types unsuitable for irrigation. Those areas included cultivated crops, developed
22 areas(municipal zones, roads, etc.), wetlands, and open water. All other land cover types
23 were considered minimally suitable for irrigation. Suitable land cover areas were combined
24 with the selected soil areas to create areas for PIA consideration.

25 b) Crop Selection

26 The Nation's expert conducted research on crop types suitable for production in the
27 LCR Basin and their corresponding crop water requirements. The research considered crops
28 typically grown and marketed in Arizona and other arid environments, current farming

1 practices on the Navajo Reservation, available programs offering financial support and
2 subsidies, and feasible irrigation practices.

3 Water supplies and climatic conditions drive the ability to grow crops, irrigate, and
4 dryland farm. Given the arid environment of northern Arizona, the research indicates crops
5 with low irrigation requirements are well suited for the LCR Basin. In addition, agricultural
6 support programs are available to foster the production of these types of crops.

7 c) Water Supply

8 PIA would be irrigated primarily with surface water supplies and supplemented by
9 alluvial groundwater. The Nation's expert considered the development of reservoirs for
10 water storage to augment the water supply.

11 3. Resulting PIA Claim

12 Based on the methodology and existing information, the expert has concluded that
13 39,000 acres are available for PIA. An initial estimate of the annual acre-feet of water for the
14 PIA is 143,000 AFA of combined annual water supplies from surface water, storage, and
15 groundwater.

16 V. SUMMARY

17 The Navajo Nation's Amended Statement of Claimant – Phase III Claims is for those
18 waters which arise from, flow through or over, and lie under the lands of the Navajo Nation.
19 To the extent that such waters are insufficient to meet the permanent homeland needs of the
20 Navajo Reservation within the LCR Basin, the Nation reserves the right to obtain water from
21 other sources to meet its federal reserved rights. Furthermore, the Nation reserves the right
22 to further amend this Amended Statement of Claimant – Phase III prior to the conclusion of
23 hearings by the Special Master in this subproceeding as provided by A.R.S. § 425-254(E)(2).

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1 Dated this 1st Day of December, 2021.

2 SACKS TIERNEY

3
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CERTIFICATE OF SERVICE

ORIGINAL of the foregoing Hand-Delivered for filing this 1st day of December, 2021, to:

Arizona Department of Water Resources
c/o Thomas Buschatzke, Director
1110 W. Washington Street, Suite 310
Phoenix, Arizona 85007

COPIES of the foregoing sent by First-Class U.S. Mail this 1st day of December, 2021, to:


All parties on the Court Approved Mailing List,
In re Navajo Nation, Contested Case No. 6417-300, November 3, 2021



1
2 **VERIFICATION OF THE NAVAJO NATION**

3 Pursuant to A.R.S. § 45-183(B), I verify under penalty of perjury under the laws of
4 the United States of America that to the best of my knowledge and belief, the statements
5 made in this document titled Navajo Nation's Amended Statement of Claimant – Phase III
6 Claims (Irrigation), and the claims asserted herein by the Navajo Nation are true and
7 correct.

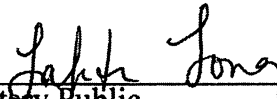
8 By making this verification, neither I, the Navajo Nation, nor any of its agencies or
9 personnel, waive any immunities, rights, privileges, or presumptions, whether based on
10 federal, state, or other statutory and/or common law, except as clearly and unambiguously
11 required by congress.

12 
13 Jason John
14 Navajo Nation
15 P.O. Box 2010
16 Window Rock, Navajo Nation, AZ 86515

17 Executed on: November 30, 2021

18 STATE OF ARIZONA
19 COUNTY OF APACHE

20 The foregoing subscribed and sworn (or affirmed) before me this 30th day of
21 November 2021, by Jason John.

22 
23 Notary Public

24 My Commission Expires: 10/14/2023

